

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF NATURAL RESOURCES

In the Matter of the Permit Application
No. 86-6226 of American Iron

**ORDER DENYING MOTION FOR
PARTIAL SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Steve M. Mihalchick on a Motion for Determination of Applicability of Minn. R. 6115.0211, subp. 3, filed by American Iron & Supply Co. (American Iron) on November 30, 2005. The Department of Natural Resources (the DNR) filed a Memorandum of Law in Opposition to American Iron's Motion for Partial Summary Disposition on December 6, 2005. Oral argument on the motion was held on December 12, 2005. The record was closed on December 15, 2005, upon receipt of additional documents from American Iron.

Elizabeth H. Schmiesing, Peter C. Hennigan, and Kristen M. Gast, Faegre & Benson LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-3901, appeared on behalf of American Iron & Supply Co. David P. Iverson, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the DNR.

Based upon all of the filings in this matter and the arguments of counsel, and for the reasons discussed in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. American Iron's motion for partial summary disposition is **DENIED**.
2. The parties shall confer and file a proposed schedule for the hearing in this matter.

Dated: June 22, 2006

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Summary Disposition

American Iron has applied for a public waters permit to place sheet piling around two existing barges that were sunk in the Mississippi to create wharves used by American Iron to dock and load barges with its scrap metal. American Iron characterizes the project as a "repair." DNR apparently concluded that the project was the "construction" or "reconstruction" of wharves under Minn. R. 6115.0211, subp. 3, and denied the permit in part on the ground that the project did not meet standards established by that rule. American Iron appealed and has now moved for partial summary disposition, asking that the ALJ determine that the project is not "construction" or "reconstruction."

Summary disposition is the administrative law equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.¹ The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition regarding contested case matters.² A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.³

Upon a motion for summary disposition, an administrative law judge must carefully scrutinize the pleadings, depositions, admissions, and affidavits, on file, not to decide any issue of fact that may be presented, but to discover if any genuine issue of fact exists. In this process all doubts and factual inferences must be resolved against the movant and in favor of the party opposing the motion.⁴ Although the burden is on the moving party to show the absence of any material fact, once the movant has supported the motion, "the opponent must show that a material issue of fact remains in dispute by presenting specific admissible facts giving rise to a factual question." Summary judgment should only be granted in those instances where there is no dispute of fact and where

¹ *Louwegie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R., 1400.5500K; Minn. R. Civ. Pro. 56.03.

² See, Minn. R. 1400.6600.

³ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁴ *Offerdahl v. University of Minn. Hosp. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988).

there exists only one conclusion.⁵ Any doubt regarding the existence of a genuine fact issue will be resolved in favor of its existence even if the fact issue has not been fully identified or described by the opponent to the motion.⁶

Facts

For purposes of this motion and viewing the evidence most favorably to the DNR, American Iron is a commercial metal recycling business located on the west bank (“right descending bank”) of the Mississippi River in North Minneapolis.⁷ The US Army Corps of Engineers maintains a nine foot channel in the river that starts one mile north of the American Iron property and extends to the south.⁸ The channel is used by barge and other boat traffic.

In 1981, American Iron sunk an empty 200 foot in by 35 foot barge in the Mississippi River adjacent to its shoreline, secured it to the shore land, and filled it with earth and other material to create a loading dock for river barges. In 1985, American Iron sunk, secured, and filled another barge of the same size along its shoreline about 175 feet from the first barge.⁹ Shipping by barge is essential to the efficient operation of American Iron. Today, thirty percent of the material shipped by American Iron is shipped by river barge. American Iron's operation requires docking facilities that will accommodate two barges at a time; one being loaded and the other being delivered or picked up by a tugboat or waiting to be picked up. American Iron expects that the portion of its material shipped by barge will double soon as it incorporates new technology into its operations.¹⁰

American Iron did not apply for the permits required by law from the Army Corp of Engineers and the DNR until after the barges had been sunk and put into use. In a request dated September 27, 1985, American Iron applied to the Corps of Engineers for a permit for the barge docks. On February 5, 1986, the Corps of Engineers issued a permit to American Iron to “retain two industrial docks constructed by sinking two steel barges and filling them with earthen material in the Mississippi River. . . .” One of the General Conditions listed in the permit was,

⁵ *Bixler by Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 215 (Minn. 1985).

⁶ *Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286 (Minn. 1983). (issues of fraud preclude summary judgment even though the facts had not been pled with particularity as required by Rule 9.02).

⁷ Affidavit of Daryl Parks and Affidavit of Dale Homuth (Homuth Aff.).

⁸ The upstream limit of the channel is at river mile 857.8 and the American Iron property is around river mile 856.8. Affidavit of Kristin Gast, Ex. 1 at ACE 009 (Gast Aff. ____).

⁹ The sunken barges have been referred to by various names, including “industrial docks,” “sunken barges,” “barge docks,” “docks,” and “sunken barge loading docks.” Gast Aff. Exs. 1, 3, 8, 9, and 10. They will be referred to in this Order as “the barge docks.”

¹⁰ Affidavit of Daryl Parks.

That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.¹¹

On March 17, 1986, American Iron applied to the DNR for a public waters permit for the barge docks.¹² DNR personnel had some concerns about the unorthodox structures, but three years later the DNR issued Permit Number 86-6226, dated April 26, 1989, which authorized American Iron to “retain 2 sunken barges measuring 200' by 35' each, set 175' apart and secured to shoreline.”¹³

The expiration date block of the permit was filled in with “DNA,” meaning “does not apply”. At the same time, the DNR issued Permit Number 89-6136, dated April 26, 1989, to American Iron, which, according to the cover letter, authorized it to maintain the dredged area in front of the barge docks. The permit itself authorized American Iron to “excavate” the area, again with the expiration date marked “DNA.”¹⁴ The DNR put no maintenance provision in the permit. DNR now alleges that it did so because some of its staff was thinking at the time that when the barges eventually deteriorated, they would be removed and replaced with an alternative docking facility.¹⁵ This position may not have been recorded or made known to American Iron at the time and may be inconsistent with some of DNR’s subsequent actions. Several disputed facts surround this issue at this point. However, it cannot be disputed that one of DNR’s goals is “to limit the occupation of public waters by offshore . . . structures [and to] encourage the removal of existing structures which do not serve the public interest from the beds of public waters at the earliest practicable date.”¹⁶

The barge docks are suffering wear and tear. By 2004, American Iron determined that repairs were necessary because of delamination (separation into constituent layers) of the steel sides of the barge docks, accumulation of river-borne material around the barge docks, and siltation in front of the barge docks and in the access to the nine-foot navigation channel, all of which made docking of barges somewhat more difficult. Therefore, on a combined local/state/federal application form dated September 23, 2004, American Iron applied for a permit to repair the deteriorating sunken barges by making extensive modifications. They proposed driving sheet pilings about two feet out from the river sides of both barge docks and driving sheet pilings from the new extended dock corners at an angle back to the shore to create angled walls or “wings” between the dock corners and the shore. The area around the docks and to the navigation channel would then be dredged and the dredged material would be used to fill in the new areas between the sheet pilings and the existing barge docks and shoreline. The

¹¹ Homuth Aff., ¶ 4; Gast Aff., Ex. 1.

¹² American Iron Ex. 16 (Homuth Depo. Ex. 36).

¹³ Homuth Aff., ¶ 5 and Ex. A; Gast Aff., Ex. 3.

¹⁴ The cover letter for the two permits was dated April 24, 1989. Homuth Aff., Ex. A and Gast Aff., Ex. 3.

¹⁵ Gast Aff., Ex. 12.

¹⁶ Minn. R. 6115.0210, subp. 1.

dredged material would also be used to cover the entire area, including the barge docks, so that the elevation of the improved docks would be raised and graded to direct storm water runoff back onto American Iron's shore land property.¹⁷

The Corps of Engineers approved the project on October 14, 2004, apparently finding it to be within the parameters of Department of the Army General Permit GP-001-MN. That General Permit is used by the Corps of Engineers to automatically authorize, with minimal review, most activities that are regulated and approved by the DNR.¹⁸

On October 27, 2004, the DNR's area hydrologist Molly Shodeen wrote American Iron that she was reviewing the file and found that there had been discussion previously about removing the barge docks eventually, rather than allowing repairs that would prolong their life, because they were not the type of facility that would normally be authorized. She stated that the structures were originally placed without DNR authorization and granted an after-the-fact permit that purposely had no maintenance provision so that when the barges eventually deteriorated, they would be removed and replaced with an alternative docking facility. She asked that American Iron submit an analysis of other options with less environmental impact and stated that final action would not be taken until additional detailed information was provided.¹⁹

The increased area, fill, and sloping of the project created floodway issues with the City of Minneapolis. Meanwhile, the DNR Regional Hydrologist, Dale Homuth, advised American Iron that DNR would approve the project when Minneapolis approved the floodway and local permit.²⁰ However, the floodway issues could not be resolved promptly, so American Iron withdrew its permit application on January 20, 2005.²¹

On February 3, 2005, American Iron submitted the application at issue here. American Iron did away with the previously proposed increase in footprint and elevation of the barge docks. Instead, American Iron proposed cutting the peeling and buckling old steel off the outside of the barge docks and driving new sheet piling exactly where the old steel siding had been cut off and attaching it to what was left of the barges. American Iron also proposed dredging the area around the barge docks and out to the 9 foot navigation channel and hauling the dredged materials off-site. Under the new application, no fill would be needed or added, no changes would be made in the elevation of the existing barge docks, and no additional river displacement would occur.²²

¹⁷ Homuth Aff., Ex. B, and Gast Aff., Ex. 8 at DNR 0031.

¹⁸ Gast Aff., Ex. 9 at DNR 0204.

¹⁹ Gast Aff., Ex. 12.

²⁰ Gast Aff., Ex. 4.

²¹ Gast Aff., Ex. 8 at DNR 0031; Memorandum of American Iron at 3.

²² Gast Aff., Ex. 8, and Homuth Aff., Ex. C.

The City of Minneapolis approved the dredging and the changes to the barge docks. On March 17, 2005, the Corps of Engineers approved the project under GP-001-MN, subject to American Iron receiving a DNR permit and any other required authorizations. On March 22, 2005, the DNR approved American Iron's request as to the maintenance dredging only.²³

By letter of May 3, 2005, the DNR denied the requested permit to install sheet piling around the barge docks. Several reasons were stated for the denial. As far as is relevant to this motion, the letter quoted the following language of Minn. R. 6115.0211, subp. 3:

Wharves. A permit is required for the construction or reconstruction of all wharves. The following order of preference for construction types shall be utilized: bulkheaded shoreline, inland slip with bulkheaded sidewalls, and wharf projecting into public waters.

The letter did not expressly allege or find that the project was "construction" or "reconstruction". It made no findings on the cost of the project and DNR had no data upon which such a finding could be based. Nonetheless, the letter stated that various requirements of Minn. R. 6115.0211, subp. 3, must be met before a permit can be issued and that those requirements "had not shown to have been satisfied."²⁴ American Iron seeks a determination that the letter was wrong because its current project is a "repair," not "construction" or "reconstruction."

Analysis

As seen above, Minn. R. 6115.0211, subp. 3, requires a permit for the construction or reconstruction of any wharf. The parties agree that the barge docks are wharves within the meaning of the rules. The term "construction" is not defined in the related rules. Minn. R. 6115.0170, subp. 32, defines "reconstruction" as "the rebuilding or renovation of an existing structure, where the cost of such work will exceed 50 percent of the replacement cost." Therefore, Minn. R. 6115.0211, subp. 3, applies to the project if, but only if, American Iron's project is "construction" or "reconstruction."

The DNR argues that the project constitutes construction.²⁵ It claims that what now exists are two sunken barges and that American Iron is not merely

²³ Gast Aff., Exs. 9 and 10, and Homuth Aff., Ex. D.

²⁴ Gast Aff., Ex. 10, and Homuth Aff., Ex. D.

²⁵ American Iron argued at oral argument that the DNR had not raised the issue of the project being "construction" in its letter denying the permit. Actually, the denial letter alleged that the barge docks were "wharves" and therefore subject to the section of the rules that applies to wharves. It then cited Minn. R. 6115.0211, subp. 3, including the first sentence on construction and reconstruction. The heart of the allegation is that the rule applies, thereby implying that the project is "construction" or "reconstruction." And since the denial letter said nothing about costs, it more likely implies that the DNR considered the project to be "construction." Either way, American Iron is fully capable of addressing the implied allegations and had reasonable notice of the issues involved.

repairing the deteriorating barges by securing or replacing the bulging barge siding. Rather, the DNR argues, American Iron is proposing to construct new structures by driving sheet pile into the riverbed around the barge docks, thereby creating typical bulkhead-sided wharfs secured to the river bottom by sheet piling.²⁶

The Administrative Law Judge disagrees. According to the Merriam-Webster Online Dictionary, one meaning of bulkhead is, “a retaining wall along a waterfront.” So the sunken barges, which have steel siding functioning as retaining walls, are already “bulkhead-sided wharfs.” Under American Iron’s current proposal, the structural framework of the barges and the earthen fill within them will remain unchanged. The barges will have new siding that is driven into the riverbed. Covering, and in some cases replacing, the old steel siding with new sheet piling, which is also sheets of steel, does not create fundamentally different structures. Nor does the fact that the sheet piling will be driven into the riverbed. The barge docks sit on the riverbed and are secured to the shore. They don’t move, except for some listing because of siltation under one of the barge docks. There is no significant difference in the area of the riverbed covered. No riverbed will become part of American Iron’s upland property, as the DNR alleges, unless it did so at the time the permit was issued in 1989. The resided docks will be essentially the same structures.

Moreover, “construction” as used in the rule, implies the building of something new where nothing existed or where previous structures are removed or substantially overbuilt. That was the case with the 2004 proposal, but it is not the case with the current application. American Iron’s project is not “construction.” The project is better described as a “renovation” of the two existing structures, or as a “repair.”

The next issue is whether the renovation is so extensive so as to constitute “reconstruction.” Again, under Minn. R. 6115.0170, subp. 32, American Iron’s project will be “reconstruction” if the cost of the project will exceed 50 percent of the replacement cost.

The only evidence on costs was offered by American Iron. American Iron obtained estimates of construction costs for five different scenarios from Carl Bolander & Sons, Inc., a full-service construction company in St. Paul. The construction estimates were prepared by Quint McDermund, an employee of Bolander. Mr. McDermund provided the following construction cost estimates:²⁷

Scenario #1	\$4,645,000
Install 1025 ft of Navigable Dock for entire length of shore	
Materials	\$1,400,000
Bolander labor and equipment to install wall from land	\$850,000
Bolander labor and equipment for site work for Tie-back system	\$300,000

²⁶ DNR Memorandum at 6-9.

²⁷ Aff. of Quint McDermund.

Marine Subcontract to install wall from river	\$425,000
Marine Subcontract for dredging	\$900,000
Remove and Dispose of Existing Barges	\$770,000
Scenario #2	\$3,251,000
Construct 300 ft by 100 ft inland slip	
Materials	\$1,102,000
Bolander labor and equipment to install wall from land	\$562,000
Bolander labor and equipment for site work for Tie-back system	\$262,000
Bolander labor and equipment for slip excavation & disposal	\$555,000
Remove and Dispose of Existing Barges	\$770,000
Scenario #3	\$2,265,000
Retrofit barges, construct wharf and secure to shore	
Materials (Sheet pile & accessories)	\$360,000
Purchase 2 barges-delivered	\$140,000
Bolander labor and equipment to install wall from land	\$562,000
Bolander labor and equipment to dredge and dispose	\$272,000
Bolander labor and equipment to sink barges	\$111,000
Bolander labor and equipment to reinforce & secure to land	\$50,000
Remove and Dispose of Existing Barges	\$770,000
Scenario #4	\$618,000
Construct sheet wall for existing barges	
Materials (Sheet pile & accessories)	\$355,000
Bolander labor and equipment to install wall from land	\$238,000
Bolander labor and equipment to dredge and dispose	\$25,000
Scenario #5	\$1,010,000
Remove existing docks and restore natural embankment	
Bolander labor and equipment to dredge and dispose	\$25,000
Remove and Dispose of Existing Barges	\$770,000
Site work and restoration	\$215,000

The first three scenarios involve removing the existing barge docks and then 1) constructing new bulkheaded shoreline, 2) constructing an inland harbor, or 3) sinking two used barges and driving sheet piling around them. Scenario #4 is American Iron's current proposal. Scenario #5 is removing the existing barge docks and restoring the shoreline to its natural state.²⁸

The DNR submitted no cost estimates of its own. Instead, it submitted the Affidavit of Kent Lokkesmoe, the Director of DNR's Division of Waters. In it he questions or disputes the necessity of some of the construction services outlined by Mr. McDermant. He does not dispute Mr. McDermant's estimates of the cost of any of the construction services.

²⁸ Aff. of McDermant.

The cost of the proposed project is \$618,000. If the dredging costs of \$25,000 are excluded, the cost of the project is \$593,000.

In 1983, DNR adopted a rule amendment changing the definition of “reconstruction” to its current form. The amendment read as follows:

“Reconstruction” means the rebuilding or renovation of an existing structure, where the cost of such work will exceed 50 percent of the replacement cost of a dam or 50 percent of the assessed value of other structures.²⁹

In the Statement of Need and Reasonableness accompanying the proposed amendments, DNR stated that this rule was being revised to delete unnecessary language and that the use of assessed value was being eliminated because assessed values are not generally available for shoreline structures.³⁰

Thus, it appears that DNR was familiar with appraisal terminology and intended that the term “replacement cost” have the meaning used in the appraisal industry. That meaning is, “Replacement cost is the estimated cost to construct a building with an equivalent utility to the building being appraised, at current prices, using modern materials, standards, design and layout.”³¹ As applied here, replacement cost is the lowest price for which a docking facility with equivalent capacity could be built in the same location using today’s materials and standards.

The first three scenarios all construct docking facilities that provide utility equivalent to the existing barge docks. Scenario #3 is the lowest cost, \$2,265,000. The construction cost of \$618,000 is 27 percent of that.

DNR objects to several of the items in Mr. McDermand’s construction cost estimate for Scenario #3. First, DNR asserts that the materials and installation costs for sheet piling walls around three sides of the new barges should not be included because this represents an improvement over the existing sunken barges, which are not encased in sheet pile. However, DNR presented no evidence that current construction standards would allow used barges to be sunk the way they were in the 1980s. Mr. McDermand presented credible evidence that construction of an equivalent structure with used barges would be done with a sheet piling wall. Given what has happened to the barge docks over time, it cannot be said that his testimony is not credible. Mr. McDermand also stated that a more conventional construction method would be more expensive. To counter this evidence, DNR must show that a material issue of fact remains in dispute by presenting specific admissible facts giving rise to a factual question.³²

²⁹ 7 State Register 1396 (April 4, 1983).

³⁰ Statement of Need and Reasonableness at 26 (copy submitted by American Iron).

³¹ *American Express Fin. Advisors, Inc. v. county of Carver*, 573 N.W.2d 651, 660 (Minn.1998).

³² *Continental Sales and Equipment Co. v. Town of Stuntz*, 257 N.W.2d 546, 550 (Minn. 1977).

DNR has not done so. For purposes of this motion, no basis for removing the costs for the walls from Mr. McDermant's estimate has been shown.

DNR objects to the cost for dredging and disposal because the DNR has granted a permit for maintenance dredging. The purpose of the dredging and disposal listed by Mr. McDermant is not clear. It may be for maintenance dredging, it may be for preparing the riverbed for the barges to lie upon, it may include dredging out to the 9 foot channel. There are issues of fact on this material issue.

Finally, DNR objects to inclusion of the cost of removal and disposal of the existing barges. Mr. Lokkesmoe testified that removal costs are not typically included in project proposals and should not be because they would inflate replacement cost determinations and unreasonably extend the existence of nonconforming structures in public waters. American Iron argues that removal of the existing barges would be necessary and that the cost must be included.

Mr. Lokkesmoe's testimony is sufficient to raise a factual and legal issue as to whether removal costs are included in appraisals, either as land costs or part of the building appraisal. This issue is disputed and cannot be decided without further evidence and argument.

If DNR is correct that the dredging and old barge removal costs should be removed from the Scenario #3 cost estimates, the "replacement cost" would be \$1,223,000. The project cost, with dredging cost removed under DNR's theory, is \$593,000. That is 48 percent of the replacement cost. That is less than 50 percent, but simply too close a fact determination to be made upon the limited evidence presented here. Moreover, questions of material fact beyond those discussed above exist in Mr. McDermant's estimates. For example, the cost of dredging and disposal is only \$25,000 in Scenario #4, but it is \$272,000 in Scenario #3. Similarly, the cost of the labor to install walls around two barges in Scenario #4 is \$238,000, but \$562,000 in Scenario #3. These appear to be somewhat inconsistent on their face and have not been explained. Because these and other issues of material fact remain, American Iron's motion for partial summary disposition must be denied.

S. M. M.